Victory Enterprise v Chin Wei Yoon

HIGH COURT (MELAKA) — CIVIL SUIT NO MT1–22–73 OF 2004
LOW HOP BING J
9 NOVEMBER 2004

Civil Procedure — Injunction — Interlocutory injunction — Grounds to consider — Serious question to be tried and resolved at trial — Balance of convenience — Whether injunction sought prohibitory or mandatory in nature

Civil Procedure — Injunction — Interim injunction — Mandatory injunction — Principles applicable — Exceptional circumstances — Balance of convenience

Contract — Breach of contract — Interlocutory proceedings — Serious question requiring mature consideration at trial

The plaintiff is a partnership firm carrying on the business of buying and selling timber logs while the defendant is a sole proprietor trading as Jinxin Timber Enterprise and also trading as Anjung Timber Enterprise. The defendant trading as Anjung Timber Enterprise has obtained permit from the Forestry Department to extract, remove and transport timber logs from the concession. Pursuant to an agreement, the defendant agreed to sell to the plaintiff all the timber logs extracted from the concession. At the request of the defendant and in consideration of an advance payment of RM220,000 made by the plaintiff to the defendant for the period from 17 February 2004 to 25 March 2004 pursuant to the agreement.

From 10 March 2004 to 8 April 2004, the defendant has failed to sell to the plaintiff all the timber logs extracted from the concession pursuant to the agreement but merely a part thereof valued at RM135,062.40 was sold to the plaintiff. The plaintiff discovered that the defendant without the plaintiff's prior consent sold and/or disposed of the extraction of timber logs from the concession to a third party. The plaintiff filed an action for breach of contract and various other relief followed by this application for an interlocutory injunction.

The issues for consideration were: (a) whether there are any bona fide issues to be tried; (b) whether justice of the case is in favour of the plaintiff; (c) whether the balance of convenience is in favour of the plaintiff and (d) whether the injunction sought by the plaintiff is prohibitory or mandatory in nature.

Held, allowing the application:

(1) There are at least two *bona fide* serious issues to be tried. These issues may only be resolved at the trial by way of *viva voce* evidence which is to be subject to cross-examination and re-examination in order to enable the court to undertake a mature consideration and subsequently to arrive

at a specific finding of fact and proper determination on these issues (see para 16).

(2) As the timber logs extracted from the concession for all intents and purposes would arguably have to be sold to the plaintiff pursuant to the agreement and so the defendant's inability to sell them or that they would perish is more imaginary than real. The grant of the injunction to the plaintiff would result in no prejudice to the defendant who has, in any event prior to this application, sold to the plaintiff the extraction of timber logs from the concession. In the circumstances, the justice of the case is in favour of the plaintiff (see para 20).

(3) Being a discretionary remedy, the grant or refusal of an *inter partes* interlocutory injunction must be determined by reference to established judicial principles, having regard to all the facts and circumstances prevailing in each particular case. The fact that the defendant has not put up any argument in relation to his financial resources would appear to throw some doubt as to his means to pay damages to the plaintiff in the event the plaintiff succeeds in the main suit against the defendant. As such the balance of convenience is in favour of the plaintiff to allow the status quo to be maintained (see para 24 and 25).

(4) Terms of the injunction sought by the plaintiff although prohibitory in language is mandatory in substance and effect. Mandatory injunction should not be granted save in exceptional and extremely rare cases. Factual background clearly shows that what the plaintiff is seeking in the injunction is not what he never had before and this is also inline with the agreement entered between the plaintiff and the defendant (defendant's obligation to sell timber logs from the concession to plaintiff). Therefore, the facts and circumstances of this case are exceptional and would constitute one of the extremely rare cases which would warrant the intervention of the court by granting the injunction (see para 33).

[**Bahasa Malaysia summary**

Plaintif merupakan sebuah firma perkongsian yang menjalankan perniagaan jual-beli kayu-kayu balak manakala defendan merupakan pemilik tunggal yang berniaga di bawah nama yang dikenali sebagai Jinxin Timber Enterprise dan juga Anjung Timber Enterprise. Defendan yang berniaga di bawah nama Anjung Timber Enterprise telah memperoleh permit daripada Jabatan Perhutanan untuk mengeluarkan, memindahkan dan mengangkut kayu-kayu balak dari konsesi tersebut. Berdasarkan perjanjian antara plaintif dan defendan, defendan bersetuju untuk menjual kepada plaintif kesemua kayu-kayu balak yang dikeluarkan daripada konsesi tersebut. Atas permintaan defendan dan juga sebagai balasan, plaintif telah membayar kepada defendan bayaran pendahuluan yang berjumlah RM220,000 untuk tempoh dari 17 Februari 2004 sehingga 25Mac 2004 mengikut perjanjian tersebut.

Mulai 10 Mac 2004 sehingga 8 April 2004, defendan telah gagal untuk menjual kesemua kayu-kayu balak yang dikeluarkan daripada konsesi tersebut kepada plaintif mengikut perjanjian tersebut tetapi hanya menjual sebahagian daripada kayu-kayu balak yang kesemuanya berjumlah RM135,062.40 kepada plaintif. Plaintif telah mendapat tahu bahawa defendan tanpa kebenaran bertulis terlebih dahulu daripada plaintif telah menjual dan/atau melupuskan kayu-kayu balak yang dikeluarkan daripada konsesi tersebut kepada pihak ketiga. Plaintif memfailkan tindakan ini untuk pemecahan kontrak dan juga lain-lain relief dan diikuti dengan permohonan ini untuk injunksi interlokutori.

Isu-isu untuk pertimbangan adalah: (a) sama ada terdapat sebarang isu-isu *bona fide* untuk dibicarakan; (b) sama ada keadilan kes adalah berpihak kepada plaintif; (c) sama ada imbangan kebarangkalian berpihak kepada plaintif dan (d) sama ada injunksi yang dipohon oleh plaintif adalah bersifat halangan atau mandatori.

Diputuskan, membenarkan permohonan tersebut:

(1) Terdapat sekurang-kurangnya dua isu untuk dibicarakan. Isu-isu tersebut hanya boleh diselesaikan menerusi perbicaraan dengan pemberian keterangan yang mana tertakluk kepada pemeriksaan balas dan pemeriksaan semula dalam membolehkan mahkamah mengambil penilaian yang matang dan seterusnya mencapai penemuan fakta yang spesifik dan pemutusan yang sewajarnya terhadap isu-isu ini (lihat perenggan 16).

(2) Memandangkan kayu-kayu balak yang dikeluarkan daripada konsesi tersebut seharusnya dijual kepada plaintif mengikut perjanjian tersebut dan ketidakupayaan defendan untuk menjual kayu-kayu balak tersebut atau kayu-kayu balak tersebut akan musnah adalah lebih merupakan imaginasi daripada realiti. Pemberian injunksi kepada plaintif langsung tidak memprejudiskan defendan, di mana defendan sebelum permohonan ini sememangnya menjual kayu-kayu balak yang dikeluarkan daripada konsesi tersebut kepada plaintif. Maka, dalam keadaan ini, keadilan kes adalah berpihak kepada plaintif (lihat perenggan 20).

(3) Pemberian atau penolakan *inter partes* injunksi interlokutori yang merupakan remedi budi bicara hendaklah diputuskan berdasarkan prinsip-prinsip kehakiman yang sudah mantap dengan mengambil kira kesemua fakta-fakta dan keadaan kes itu sendiri. Fakta bahawa defendan tidak mengutarakan sebarang hujahan terhadap sumber kewangannya mewujudkan sedikit keraguan terhadap keupayaannya untuk membayar ganti rugi kepada plaintif sekiranya plaintif memperoleh penghakiman terhadap defendan di dalam tindakan utama. Maka, imbangan kebarangkalian adalah berpihak kepada plaintif yang membenarkan supaya status quo dikekalkan (lihat perenggan 24 dan 25).

(4) Terma injunksi yang dipohon oleh plaintif walaupun halangan dari segi bahasa tetapi adalah mandatori dari segi hakikat dan kesan. Injunksi mandatori tidak seharusnya dibenarkan kecuali dalam kes-kes luar biasa. Fakta-fakta kes dengan jelas menunjukkan bahawa apa yang dipohon oleh plaintif adalah injunksi yang bukan merupakan apa yang tidak diperoleh sebelum ini dan ini juga selaras dengan perjanjian antara plaintif dan defendan (obligasi defendan untuk menjual kayu-kayu balak dari konsesi kepada plaintif). Oleh yang demikian, fakta dan keadaan kes ini adalah luar biasa yang mana memerlukan campur tangan mahkamah dengan membenarkan injunksi yang dipohon (lihat perenggan 33).]

Notes

For cases on breach of contract generally, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2222–2406.
For cases on interim injunctions, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2628–2670.
For cases on interlocutory injunction, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2707–2794.
For injunctions, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) paras [10.5-001]–[10.5-35].

Cases referred to

Amalan Tepat Sdn Bhd v Kubang Media Sdn Bhd [2004] 5 MLJ 109 (refd)
Interkol (M) Sdn Bhd v Bandar Utama City Promenade Sdn Bhd & Anor [1999] 5 CLJ 376 (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)
Maxis Sdn Bhd v Suruhanjaya Syarikat Malaysia [2004] 2 MLJ 84 (folld)
RCA Sdn Bhd v Pekerja-Pekerja RCA Sdn Bhd & Ors [1991] 1 MLJ 309 (refd)
Sivaperuman v Heah Seok Yeong Realty Sdn Bhd [1979] 1 MLJ 150 (refd)
Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok [1975] 2 MLJ 109 (refd)

Chew Wee Kian (H S Chew & Co) for the plaintiff.
Rao Suryana (Rao Suryana) for the defendant.

Low Hop Bing J:

I APPLICATION

[1] This is an application by way of summons in chambers in encl (3) for an *inter partes* interlocutory injunction against the defendant and the officers of the Forestry Department Negeri Sembilan to restrain the defendant whether by himself, his agents or servants or howsoever from selling and/or disposing of timber logs which had been extracted from the concession in Seremban TNB Mukim Semenyih from AP49 to AP66 (Rentas Talian Penghantaran

275 KV from PMU Lenggeng to PMU Paroi) ('the concession') to any other party except to the plaintiff as agreed in the written agreement executed between the plaintiff and the defendant on 17 February 2004 ('the agreement') until the final disposal of the writ of summons herein.

II PLAINTIFF'S CLAIM

[2] Apart from a prayer for an injunction in the aforesaid terms, the plaintiff's claim also seeks the following reliefs:

(1) An audited account of the value of timber logs extracted from the concession and wrongfully sold by the defendant to other parties for the period from 9 April 2004 to the hearing of the plaintiff's action herein;

(2) An order that the defendant make payment to the plaintiff for loss of profits incurred by the plaintiff by reason of the defendant's breach of the agreement;

(3) Damages to be assessed by the court by reason of the defendant's breach of the agreement;

(4) Interest at the rate of 8% per annum on all judgment sums calculated from the date of this writ of summons to the date of realisation;

(5) costs; and

(6) such other order or relief as the court deems fit.

III FACTUAL BACKGROUND

[3] The plaintiff is a partnership firm carrying on the business of buying and selling timber logs while the defendant is a sole proprietor trading as Jinxin Timber Enterprise and also trading as Anjung Timber Enterprise.

[4] The defendant trading as Anjung Timber Enterprise has obtained permit No NB.01/16/2004 from the Forestry Department to extract, remove and transport timber logs from the concession.

[5] Pursuant to the agreement, the defendant agreed to sell to the plaintiff all the timber logs extracted from the concession with a tribute of RM30 per metric ton ('mt').

[6] At the request of the defendant and in consideration of an advance payment of RM220,000 made by the plaintiff to the defendant for the period from 17 February 2004 to 25 March 2004 pursuant to the agreement, the defendant has agreed to the repayment thereof by offsetting from the price of the timber logs to be extracted, sold to and transported by the plaintiff from the concession.

[7] From 10 March 2004 to 8 April 2004, the defendant has failed to sell to the plaintiff all the timber logs extracted from the concession but merely a part thereof ie 389,548mt valued at RM135,062.40.

[8] Since 9 April 2004, the defendant has allegedly failed, refused and or/ neglected to sell to the plaintiff any of the extraction of timber logs from the concession pursuant to the agreement although the defendant has received the advance payment of RM220,000 from the plaintiff.

[9] The plaintiff alleged a breach of the agreement by the defendant who has by himself, his agents or servants wrongfully and without the plaintiff's prior consent sold and/or disposed of the extraction of timber logs from the concession to a third party known as Woon Yoon Ming vide an agreement dated 26 April 2004.

[10] On 28 April 2004, the defendant returned a sum of RM40,000 to the plaintiff who had confronted the defendant pursuant to the defendant's failure to continue the sale to the plaintiff of the extraction from the concession of about 78mt per day, which the plaintiff alleged has resulted in the plaintiff's irreparable loss of revenue which is still continuing.

[11] The plaintiff has given an undertaking as to damages for the purpose of obtaining the *inter partes* interlocutory injunction.

IV FUNCTIONS OF JUDGE HEARING THIS APPLICATION

[12] This functions of a judge, hearing an application for *inter partes* interlocutory injunction such as the instant application, have been succinctly stated by Gopal Sri Ram JCA in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 at pp 195–196 as follows:

> (1) ask himself whether the totality of the facts presented before him disclosed a *bona fide* serious issue to be tried. He must refrain from making any determination on the merits of the claim or any defence to it and identify with precision the issues raised and decide whether they are serious enough to merit a trial. If he finds that no serious question is disclosed, the relief should be refused. If, however, he finds that there are serious questions to be tried, he should move on to the next step of his inquiry;
>
> (2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. He must take into account all relevant matters, including the practical realities of the case before him and weigh the harm the injunction would produce by its grant, against the harm that would result from its refusal; and
>
> (3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and to maintain the status quo. It is a judicial

discretion capable of correction on appeal. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

(See also *Interkol (M) Sdn Bhd v Bandar Utama City Promenade Sdn Bhd & Anor* [1999] 5 CLJ 376; and *Amalan Tepat Sdn Bhd v Kubang Media Sdn Bhd* [2004] 5 MLJ 109 HC).

V *BONA FIDE* SERIOUS ISSUES TO BE TRIED

[13] Mr Chew Wee Kian, learned counsel for the plaintiff, submitted that there is a *bona fide* serious issue to be tried in relation to the alleged breach of the agreement by the defendant.

[14] Defendant's learned counsel, Miss Rao Suryana, contended that the defendant has disputed the plaintiff's cause of action on the ground that the agreement has come to an end.

[15] A careful consideration of these submissions clearly leads me to the conclusion that there are at least two *bona fide* serious issues to be tried viz :

(1) Whether there is any breach of the agreement by the defendant? and

(2) Whether the agreement has come to an end?

[16] These issues may only be resolved at the trial by way of *viva voce* evidence which is to be subject to cross-examination and re-examination in order to enable the court to undertake a mature consideration and subsequently to arrive at a specific finding of fact and proper determination on these issues.

[17] In the circumstances, I shall proceed to the next step of my inquiry ie justice of the case.

VI JUSTICE OF THE CASE

[18] It was argued for the plaintiff that the justice of the case is in favour of the plaintiff who would suffer irreparable loss if the interlocutory injunction is refused.

[19] For the defendant, it was stressed that the loss, if any, incurred by the plaintiff could be assessed, and that the grant of the injunction would result in the defendant's inability to sell the timber logs extracted from the concession and that the timber logs would perish.

[20] In my view, the above submission advanced for the defendant is not tenable, as the timber logs extracted from the concession for all intents and purposes would arguably have to be sold to the plaintiff pursuant to the agreement and so the defendant's inability to sell them or that they would perish ('*reput*' in Bahasa Malaysia) is more imaginary than real. The grant of the injunction

to the plaintiff would result in no prejudice to the defendant who has, in any event prior to this application, sold to the plaintiff the extraction of timber logs from the concession. In the circumstances, I am of the view that the justice of the case is in favour of the plaintiff.

VII STATUS QUO

[21] The stand taken for the plaintiff is that the plaintiff would not be adequately compensated in view of the defendant's admission that the defendant does not have the necessary financial resources, citing *Maxis Sdn Bhd v Suruhanjaya Syarikat Malaysia* [2004] 2 MLJ 84.

[22] In response, it was repeated for the defendant that the agreement has come to an end and that the plaintiffs claim is not *bona fide*.

[23] It is clear to me that the submission for the defendant has been dealt with above in relation to the first step of my inquiry pertaining to *bona fide* serious issues to be tried and I would not risk any repetition here.

[24] This brings me to the third and final issue for me to consider ie the remedy is discretionary in nature and is intended to produce a just result between the date of the instant application and the trial proper, and to maintain the status quo. This issue largely concerns a balance of convenience. Being a discretionary remedy, the grant or refusal of an *inter partes* interlocutory injunction must be determined by reference to established judicial principles, having regard to all the facts and circumstances prevailing in each particular case.

[25] The fact that the defendant has not put up any argument in relation to his financial resources would appear to throw some doubt as to his means to pay damages to the plaintiff in the event the plaintiff succeeds in the main suit against the defendant. In *Maxis Sdn Bhd* (supra), the defendant was not in a financial position to pay the plaintiff damages. James Foong J held that in such circumstances, an interim injunction sought by the applicants should be allowed (see p 784 b–d). I agree with the principle stated therein and hold that the balance of convenience is in favour of the plaintiff to allow the status quo to be maintained and that an early hearing date ought to be given to resolve the suit between the plaintiff and the defendant.

VIII MANDATORY INJUNCTION

[26] By way of an alternative argument, it was also submitted for the defendant that the injunction sought by the plaintiff is a mandatory injunction which according to *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150 should never be granted save in exceptional and extremely rare cases. Support was also sought in *RCA Sdn Bhd v Pekerja-Pekerja RCA Sdn Bhd & Ors* [1991] 1 MLJ 309 SC. Additionally, the defendant took the view that the injunction would give the full relief sought at the final hearing.

[27] For the plaintiff, it was contended that the injunction is a prohibitory injunction and so *Sivaperuman* (supra), has no application.

[28] In this respect, I shall now consider *Sivaperuman* (supra), where the appellant's employment as a mandore was terminated by the respondents on his dismissal. The appellant took up the question of his dismissal through his union with the Minister of Labour who referred the matter to the court as a trade dispute, which was fixed for hearing before the Industrial Court but subsequently postponed. The appellant refused to vacate the quarters despite requests by the respondent who commenced proceedings for injunction and damages, and then applied for and obtained an interlocutory injunction for possession of the quarters pending trial. On appeal to the Federal Court, Abdoolcader J (later SCJ) who delivered the judgment for the Federal Court observed that:

> (1) the injunction is in effect a mandatory injunction which is never granted before trial save in exceptional and extremely rare cases; and
>
> (2) the injunction virtually gives to the respondent the full relief actually sought to be secured at the final hearing, but the court is not precluded from making such an order when the matter is viewed on a balance of convenience: *Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok* [1975] 2 MLJ 109.

[29] The above judgment was applied by the Supreme Court in *RCA Sdn Bhd* (supra), which concerns the grant by the High Court of an interim injunction to restrain the defendants from, *inter alia*, preventing or interfering with the plaintiffs or their agents or servants in distributing union membership forms. On appeal, Harun Hashim SCJ (as he then was) in delivering judgment of the court allowed the appeal and set aside the injunction, holding, inter alia, that the effect of that injunction was to give the plaintiffs what they really want all along which they never had before without going to trial.

[30] Applying these two authoritative judgments, I am of the view that I must consider:

> (1) Whether the injunction sought by the plaintiff herein is a mandatory injunction? and
>
> (2) If the answer to the above question is in the affirmative, whether the effect of the injunction is to give the plaintiff what he never had before and has the effect of giving the plaintiff the full relief sought to be secured at the final hearing?

[31] Upon perusal of the terms of the injunction sought by the plaintiff herein, I am of the view that the injunction although prohibitory in language is mandatory in substance and effect. Hence the answer to Question 1 is in the affirmative.

[32] In the circumstances, I shall proceed to consider Question 2. It is abundantly clear to me that the factual background as alluded to above shows that the defendant pursuant to the agreement had at the material time sold to the plaintiff some of the extraction of timber logs from the concession but had stopped since 9 April 2004. Hence, what the plaintiff is seeking in the injunction herein is not what he never had before. In fact, pursuant to the agreement, that was what the plaintiff had before.

[33] Further, the injunction is only one of the items in the full relief sought by the plaintiff in his statement of claim enumerated above and does not reflect the full relief sought. The facts and circumstances herein are in my view exceptional and would constitute one of the extremely rare cases which would warrant the intervention of the court by granting the injunction.

IX CONCLUSION

[34] On the foregoing grounds, I hereby allow the plaintiff's application in encl (3) and grant an interlocutory injunction against the defendant, his servants and/or agents only. Costs of this application to the plaintiff.

[35] An early date shall be given for the hearing of the main suit herein.

Application allowed.

Reported by Sugandra Rao